

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term, 2012

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7  
8 (Argued: September 6, 2012 Decided: December 7, 2012)

9  
10 Docket No. 11-2987

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12 - - - - -x

13  
14 UNITED STATES OF AMERICA,

15  
16 Appellee,

17  
18 - v. -

19  
20 COURTNEY DALEY,

21  
22 Defendant-Appellant.

23  
24 - - - - -x

25  
26 Before: JACOBS, Chief Judge, CARNEY, Circuit  
27 Judge, and GLEESON, District Judge.\*

28  
29 Defendant Courtney Daley appeals from the judgment of  
30 the United States District Court for the Eastern District of  
31 New York (Korman, J.), convicting him of illegal reentry  
32 under 8 U.S.C. § 1326, following a conditional plea. Daley  
33 challenges the denial of his motion to dismiss the

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\* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

1 indictment. The district court ruled that the entry of the  
2 removal order against Daley in absentia was not  
3 fundamentally unfair because there was no reasonable  
4 probability that Daley would have obtained relief had he  
5 received notice of the removal proceeding and been present.  
6 Because the district court properly considered Daley's  
7 completed criminal conduct in making this discretionary  
8 determination, we affirm the judgment.

9 YUANCHUNG LEE, Federal Defenders  
10 of New York, Inc., New York, NY,  
11 for Appellant Courtney Daley.  
12

13 TIANA A. DEMAS (David C. James,  
14 on the brief), Assistant United  
15 States Attorneys, for Loretta E.  
16 Lynch, United States Attorney  
17 for the Eastern District of New  
18 York, Brooklyn, NY, for Appellee  
19 United States of America.  
20

21 DENNIS JACOBS, Chief Judge:  
22

23 Defendant Courtney Daley appeals from the judgment of  
24 the United States District Court for the Eastern District of  
25 New York (Korman, J.), convicting him of illegal reentry  
26 under 8 U.S.C. § 1326, following a conditional plea. Daley  
27 moved to dismiss the indictment on the ground that he was  
28 given no notice of the 1998 removal proceedings after which  
29 a removal order was entered in absentia. The United States

1 District Court for the Eastern District of New York (Korman,  
2 J.) ruled that the entry of the removal order was not  
3 fundamentally unfair because there was no reasonable  
4 probability that Daley would have obtained relief had he  
5 received notice of the removal proceeding and been present.

6 While his 1998 immigration proceedings were pending,  
7 Daley was arrested for robbery under the Hobbs Act and  
8 detained at the Metropolitan Detention Center in Brooklyn,  
9 New York. Although he notified the Immigration and  
10 Naturalization Service ("INS") of his new address, INS did  
11 not properly process the address change and failed to notify  
12 Daley of his ongoing immigration proceedings, so that he was  
13 ordered removed in absentia.

14 Daley was removed to Jamaica, his country of origin,  
15 but he subsequently returned to the United States. He was  
16 arrested again--this time following a domestic altercation  
17 with his estranged wife--and indicted for illegal reentry  
18 under 8 U.S.C. § 1326. He moved to dismiss the indictment  
19 pursuant to 8 U.S.C. § 1326(d), on the ground that his 1998  
20 removal order was fundamentally unfair because he was  
21 removed in absentia. In order to show fundamental  
22 unfairness, however, Daley had to show that, but for the

1 Government's error, there was a reasonable probability that  
2 he would have obtained relief from the Immigration Judge  
3 ("IJ"). The district court concluded that there was no such  
4 probability. Daley ultimately entered a conditional guilty  
5 plea that preserved his right to appeal the denial of his  
6 motion to dismiss the indictment. Daley was sentenced to 30  
7 months' imprisonment and timely appealed. For the reasons  
8 discussed below, we affirm the judgment.

#### 10 **BACKGROUND**

11 Daley was born in Kingston, Jamaica, in 1968, and came  
12 to the United States at the age of fifteen as a lawful  
13 permanent resident. In 1995, Daley was indicted in New York  
14 for possession of a loaded firearm and bail jumping. After  
15 he served a one-year sentence, INS initiated removal  
16 proceedings on January 14, 1998, pursuant to Section  
17 237(a)(2)(C) of the Immigration and Nationality Act (which  
18 allows removal of any alien convicted of certain firearm  
19 offenses).

20 At Daley's initial appearance before the IJ in February  
21 1998, he was granted additional time to find a lawyer. A  
22 preliminary hearing was eventually scheduled for September

1 18, 1998. In May 1998, however, Daley was arrested and  
2 arraigned in the Eastern District of New York on federal  
3 robbery charges under the Hobbs Act (18 U.S.C. § 1951).  
4 Daley pled guilty on August 18, 1998, but that conviction  
5 did not become final until March 1999.

6 During the summer of 1998--because of his Hobbs Act  
7 arrest--Daley was held without bail at the Metropolitan  
8 Detention Center ("MDC") in Brooklyn. At Daley's request,  
9 his girlfriend notified the INS that he was in custody at  
10 the MDC and submitted a change-of-address form on his  
11 behalf. It was received by INS and listed Daley's full  
12 name, alien registration number, and Bureau of Prisons  
13 number, clearly indicating that Daley was now residing at  
14 the MDC in Brooklyn.

15 INS somehow misplaced or mishandled this form.  
16 Presumably because he was not informed of the date, Daley  
17 failed to appear for his September 1998 hearing before the  
18 IJ. At the hearing, INS suggested that Daley might be  
19 incarcerated, and the IJ adjourned to permit INS counsel to  
20 determine Daley's whereabouts. Daley did not appear at the  
21 subsequent hearing on October 23, 1998, and INS wrongly  
22

1 informed the IJ that Daley was not in federal or state  
2 custody. The IJ ordered Daley removed in absentia.

3 Daley was subsequently sentenced to 37 months'  
4 imprisonment for his Hobbs Act conviction, and upon  
5 completing that sentence in January 2001, he was deported to  
6 Jamaica. Within a year, Daley returned to the United  
7 States.

8 In February 2010, Daley was again arrested--this time  
9 for allegedly threatening his then-estranged wife in  
10 Brooklyn. As a result of that arrest, immigration  
11 authorities learned of Daley's unlawful presence in the  
12 United States. A grand jury indicted Daley in the Eastern  
13 District of New York for illegal reentry after deportation,  
14 in violation of 8 U.S.C. §§ 1326(a), (b)(2).

15 Daley moved to dismiss the indictment pursuant to Rule  
16 12 of the Federal Rules of Criminal Procedure and 8 U.S.C.  
17 § 1326(d). Daley argued, pursuant to 8 U.S.C. § 1326(d),  
18 that it would be fundamentally unfair to rely on the 1998  
19 removal order to establish an element of the illegal reentry  
20 offense because the 1998 removal order was entered in  
21 violation of his due process rights.

22 At a November 2010 evidentiary hearing on Daley's  
23 motion to dismiss the indictment, Marguerite Mills,

1 Assistant Chief Counsel for U.S. Immigration and Customs  
2 Enforcement, testified as follows concerning INS policy in  
3 place at the time: if the IJ had been notified of Daley's  
4 Hobbs Act guilty plea on the day of Daley's removal hearing  
5 (October 23, 1998), the IJ would have administratively  
6 closed the case until the Hobbs Act conviction became final;  
7 and after the conviction became final, the IJ could have  
8 reopened the case, denied Daley any discretionary relief  
9 (including cancellation of removal), and ordered him  
10 removed.

11 In response, Daley relied almost exclusively on United  
12 States v. Scott, 394 F.3d 111 (2d Cir. 2005), arguing that  
13 the district court should not consider "future occurrences"  
14 when determining whether entry of the removal order was  
15 fundamentally unfair. Id. at 119.

16 The district court denied Daley's motion from the  
17 bench, on the ground that the failure of notice did not  
18 prejudice Daley because he would not have been granted  
19 cancellation of removal on October 23, 1998. The district  
20 court carefully distinguished Scott: "I'm not looking at  
21 future occurrences. I'm looking at what had occurred at the  
22 time of the hearing. . . . And it's what distinguishes  
23 Scott. In other words . . . if I am going to look at all of

1 the relevant factors at the time of the hearing, then you  
2 lose." Tr. of Mot. Hr'g, at 39-40 (Nov. 22, 2010)  
3 (App. 208-09). The district court explained further:

4 [T]he temporal limitation of Scott deals with a crime  
5 that's committed after that hearing. If you wanted to  
6 consider[] what happened, all the relevant information  
7 as of the date of the hearing and the relevant  
8 information includes his guilty plea for which he was  
9 ultimately sentenced, and then the question becomes he  
10 wouldn't have gotten relief. At most, they would have  
11 put off the hearing but . . . he probably wouldn't have  
12 gotten relief based on the admission that he made that  
13 he committed [Hobbs Act] extortion . . . .

14 Id. at 43 (App. 212). In short, the district court found no  
15 reasonable probability that Daley would have been granted  
16 relief had he been present at the 1998 hearing, thus he was  
17 not prejudiced, and could not dismiss his indictment for  
18 illegal reentry under Section 1326(d). Id. at 52  
19 (App. 221).

20 Daley thereafter entered a conditional plea to illegal  
21 reentry, preserving his right to appeal the denial of the  
22 motion to dismiss. On May 3, 2011, the district court  
23 sentenced Daley to 30 months' imprisonment. After the  
24 district court issued its judgment, Daley timely appealed  
25 the denial of the motion to dismiss the indictment.





1 demonstrates that-

2  
3 (1) the alien exhausted any administrative  
4 remedies that may have been available to seek  
5 relief against the order;

6  
7 (2) the deportation proceedings at which the  
8 order was issued improperly deprived the alien  
9 of the opportunity for judicial review; and

10  
11 (3) the entry of the order was fundamentally  
12 unfair.

13 8 U.S.C. § 1326(d). The only prong of Section 1326(d) at  
14 issue in this appeal is the third one: whether entry of the  
15 removal order was fundamentally unfair. The district court  
16 found--and the Government does not dispute--that Daley  
17 established the first two prongs (i.e., exhaustion of  
18 administrative remedies and deprivation of opportunity for  
19 judicial review).

20 The alien bears the burden of showing that entry of the  
21 removal order was fundamentally unfair. "To show  
22 fundamental unfairness [under Section 1326(d)(3)], a  
23 defendant must show both a fundamental procedural error and  
24 prejudice resulting from that error." United States v.  
25 Copeland, 376 F.3d 61, 70 (2d Cir. 2004) (internal quotation  
26 marks omitted). More specifically, "in order to demonstrate  
27 prejudice an alien must show that his proceeding contained  
28 errors so fundamental that he might have been deported in

1 error." Fernandez-Antonia, 278 F.3d at 159. We have  
2 adopted the same test for prejudice as used to decide claims  
3 of ineffective assistance of counsel: "[P]rejudice is shown  
4 where 'there is a reasonable probability that, but for [the  
5 error], the result of the proceeding would have been  
6 different.'" Copeland, 376 F.3d at 73 (quoting Strickland  
7 v. Washington, 466 U.S. 668, 694 (1984)). In sum, the  
8 relevant inquiry for the district court--and now for us--was  
9 whether there was a reasonable probability that Daley would  
10 have been granted cancellation of removal at his October 23,  
11 1998 removal hearing.

12 Cancellation of removal is a discretionary form of  
13 relief available if an alien "has been . . . lawfully  
14 admitted for permanent residence for not less than 5 years,"  
15 "has resided in the United States continuously for 7 years  
16 after having been admitted," and "has not been convicted of  
17 any aggravated felony." 8 U.S.C. § 1229b(a). An IJ's  
18 decision regarding cancellation of removal consists of  
19 "discretionary and factual determinations." Barco-Sandoval  
20 v. Gonzales, 516 F.3d 35, 36 (2d Cir. 2007). The IJ may  
21 consider "various positive and negative discretionary  
22 factors" when making this determination, including a  
23 criminal record, which can "weigh[] strongly against

1 granting . . . discretionary relief." Ledesma v. Holder,  
2 450 F. App'x 51, 53 (2d Cir. 2011); see also Rosario v.  
3 Holder, 627 F.3d 58, 62 (2d Cir. 2010) (noting that  
4 "factfinding and factor-balancing . . . are at the core of  
5 [the IJ's] discretion").

6 With these legal standards in mind, we turn to examine  
7 whether the district court properly considered Daley's Hobbs  
8 Act guilty plea (and the likely results of that guilty plea)  
9 when determining whether there was a reasonable probability  
10 that Daley would have obtained cancellation of removal.

## 11 12 II

13 Fundamental unfairness arises when a "fundamental  
14 procedural error" is coupled with "prejudice resulting from  
15 that error." Copeland, 376 F.3d at 70. The Government  
16 concedes that Daley established procedural error, and that  
17 on October 23, 1998, Daley was technically eligible for  
18 cancellation of removal. But Daley had to show a resulting  
19 prejudice: a reasonable probability that but for the error,  
20 he would not have been ordered removed. The district court  
21 found that Daley "wouldn't have gotten relief"  
22 notwithstanding that the Hobbs act conviction to which he  
23 had pled had not yet become final. Tr. of Mot. Hr'g, at 43

1 (App. 212). The district court credited the testimony of  
2 Marguerite Mills as to what would have happened had the IJ  
3 been aware of Daley's Hobbs Act guilty plea, but also took a  
4 broader view, concluding that regardless of whether Daley's  
5 Hobbs Act guilty plea had yet become a final conviction, an  
6 IJ considering "all the relevant information as of the date  
7 of the hearing" would not have granted Daley discretionary  
8 relief. Id. at 39, 43-44 (App. 208, 212-13).

9 On appeal, Daley relies on United States v. Scott, 394  
10 F.3d 111 (2d Cir. 2005). In that case, a lawful permanent  
11 resident was ordered removed in 1996 after two criminal  
12 convictions in New York. Id. at 113-14. He was ordered  
13 removed in absentia and never applied for waiver of  
14 deportation (the equivalent of cancellation of removal at  
15 that time). Id. He later claimed that his counsel during  
16 the removal proceedings was ineffective. Id. In 1998,  
17 after the IJ issued the removal order but before he was  
18 deported, Scott was convicted for possession of burglar's  
19 tools. Id. After his deportation and subsequent reentry,  
20 he was arrested in New York for grand larceny (among other  
21 things). Id. at 114. Following that arrest, he was charged  
22 with illegal reentry after deportation under 8 U.S.C. § 1326  
23 and sought to dismiss his indictment and collaterally

1 challenge his deportation pursuant to Section 1326(d).

2 We ruled that the district court erred by considering  
3 "ex post data"--specifically, Scott's 1998 conviction for  
4 possession of burglar's tools--in determining whether, in  
5 1996, Scott would have had a reasonable probability of  
6 relief at his deportation proceeding. Id. at 118.

7 As we explained, Section 1326(d)'s "focus on the  
8 'entry' of the [removal] order suggest a temporal limitation  
9 on the district court's inquiry." Id. "In other words, the  
10 statute itself indicates that, contrary to the district  
11 court's analysis, the only pertinent issue is whether entry  
12 of the deportation order *in 1996* prejudiced  
13 Scott--regardless of Scott's potential deportability for  
14 some later crimes." Id. (emphasis in original). "[A]s we  
15 are presently concerned about the process afforded to Scott  
16 at his deportation proceeding in 1996, it would be anomalous  
17 to consider *criminal conduct* after that date." Id. at 119  
18 (emphasis added). In sum, "in assessing whether the  
19 defendant-alien had a reasonable probability of not being  
20 deported at his proceeding but for [the error], the district  
21 court should reconstruct events as they existed at the time  
22 of the disputed deportation proceeding, without considering  
23 future occurrences." Id.

1        Here, the district court's ruling--that there was no  
2        reasonable probability that Daley would have been granted  
3        cancellation of removal--was based on circumstances as they  
4        existed on October 23, 1998, the day of Daley's removal  
5        proceeding. Tr. of Mot. Hr'g, at 39, 43-44 (App. 208, 212-  
6        13). It therefore did not run afoul of Scott.

7        In determining whether there was a reasonable  
8        probability of relief, the district court could and did  
9        consider Daley's entire criminal record as it existed at the  
10       relevant time, including his Hobbs Act guilty plea.  
11       Copeland, 376 F.3d at 74 (allowing review of entire criminal  
12       record prior to removal proceeding); Scott, 394 F.3d at  
13       118-19 (same). It considered "all relevant information"  
14       that would have been available on the day of the removal  
15       proceeding, including the fact that Daley had pled guilty to  
16       Hobbs Act robbery, when making its determination as to  
17       whether the IJ would have afforded Daley discretionary  
18       cancellation of removal. Tr. of Mot. Hr'g, at 53  
19       (App. 222). Unlike the criminal conduct in Scott--which  
20       occurred after the removal order was entered--Daley made his  
21       Hobbs Act guilty plea before October 23, 1998, the date of  
22       his removal proceedings.

1       Two considerations support this conclusion. First, the  
2       district court's "reasonable probability" analysis, by its  
3       nature, requires some degree of speculation. We have  
4       explained that "the courts must necessarily play the role of  
5       prognosticator, and divine whether, had the error not  
6       occurred, the defendant would likely have obtained  
7       immigration relief." Edwards v. INS, 393 F.3d 299, 311 (2d  
8       Cir. 2004). Daley's critique that the district court's  
9       determination was speculative or uncertain therefore gains  
10      no traction.

11      In addition, the IJ's underlying determination whether  
12      to grant cancellation of removal is also highly  
13      discretionary. See Barco-Sandoval, 516 F.3d at 36.  
14      Cancellation of removal is essentially a matter of  
15      administrative grace. Arqueta v. Holder, 617 F.3d 109, 113  
16      (2d Cir. 2010); see Jay v. Boyd, 351 U.S. 345, 354 (1956).  
17      Here, the district court analyzed circumstances as they  
18      existed on October 23, 1998 and concluded that there was no  
19      reasonable probability that the IJ would have exercised his  
20      discretion in Daley's favor. Daley presents no compelling  
21      reason to disturb that determination.

22      While an extreme reading of Scott could suggest that  
23      the district court should not consider anything that



1 occurred or could have occurred after the day of the removal  
2 order, the upshot of Scott is to prohibit consideration of  
3 *criminal conduct* occurring after entry of the removal order.  
4 Scott, 394 F.3d at 119 (noting that "it would be anomalous  
5 to consider criminal conduct after" the relevant date). To  
6 achieve Daley's desired result, one must read the line from  
7 Scott suggesting that a district court judge should  
8 "reconstruct events as they existed at the time of the  
9 disputed deportation proceeding, without considering future  
10 occurrences" to mean that the judge cannot consider the  
11 likely effects of *already completed* conduct. Such a reading  
12 would be inconsistent with the district court's inherently  
13 speculative role in carrying out the "reasonable  
14 probability" analysis and with the IJ's broad discretion in  
15 granting relief.

#### 17 CONCLUSION

18 For the foregoing reasons, we affirm the judgment.